United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1273

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1273

UNITED STATES OF AMERICA,

APPELLEE,

V.

JON GREGORY MARKS,

APPELLANT.

BRIEF OF APPELLANT JON GREGORY MARKS

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

MISCELLANEOUS

STATEMENT OF THE ISSUES

When a court receives a note from a jury seeking clarification of an instruction on the defense of coercion and that note clearly shows the jury is confused as to whether or not coercion applies to force exerted by a private individual, should the court properly advise the jury?

STATEMENT OF THE CASE

On December 12, 1975, a Federal grand jury sitting in Hartford, Connecticut, returned a ten-count indictment charging Jon Gregory Marks with being in the business of selling firearms without a license and with making, possessing, and selling various unregistered firearms.

On May 25, 1976, with The Honorable Thomas F. Murphy, Senior United States District Court Judge for the District of Connecticut, presiding, a jury trial was held in Waterbury, Connecticut. On May 27, 1976, after a trial of two days, the jury rendered a verdict of guilty on all ten counts. On the same day, the Court sentenced Marks to concurrent terms of six years on each of nine counts and a concurrent five-year sentence on the remaining count.

The case essentially involved the making, possession, and sale of four sawed-off shotguns by the appellant during the period of September, 1975, until October 15, 1975. Two handguns and a semi-automatic rifle were also included in evidence and formed the basis of count eight involving the dealing without a license charge.

Marks testified in his own behalf and readily conceded that he had done all the acts alleged and had sold the guns in question to the Federal agents. However, he raised two affirmative defenses. First, he claimed he was entrapped by the Federal agents of the Alcohol, Tobacco, and Firearms Administration. His second defense was coercion.

In furtherance of this coercion claim, Marks testified that he was heavily in debt to a former business associate, Richard Duggan (App. 28-34; 40-42). Duggan allegedly approached Marks shortly before the first handgun sale and told appellant that if he did not repay the debt by selling firearms that Marks and his friend, Thomas Conway, would be physically harmed. The threat was repeated by Duggan shortly before the first sale of shotguns to the undercover ATF agents in September, 1975. There was further evidence that Marks was terrified of Duggan and expressed great fear to his cohort Thomas Conway (App. 43-44). There was corroborative evidence by defense witness Conway that appellant had manifested fear of Duggan and that Duggan had furthered his threat by introducing appellant to one of the undercover agents who eventually purchased the sawed-off shotguns.

When appellant was first questioned on direct examination by his counsel on May 26, 1976, a colloquy with the Court ensued concerning the issue of coercion (App. 35-38). The Court was not fully aware of the coercion defense and at that point had reservations as to whether it would apply to a threat from a private individual such as Duggan, as opposed to an undercover government agent (App. 39). Defense counsel insisted the defense was applicable to the former situation and alluded to a case for which no citation was provided. The Court then recessed for ten minutes and upon the judge's

return, counsel were informed that the judge was (1) familiar with the law of coercion and (2) that the jury would be charged on it (App. 39-40). With the Court's express permission, defense counsel then proceeded to question the defendant concerning threats to his life that were made by Duggan to induce him to sell guns (App. 40-42).

After both sides closed, the Court proceeded to review its proposed instructions (App. 45-51). Besides giving the standard entrapment instruction, the Court informed counsel it was going to instruct on coercion, although not exactly as counsel had requested (App. 50). At 12:45 p.m. on May 26, 1976, the jury was reconvened and shortly thereafter both sides made closing arguments (App. 52). The prosecution, in its summation referred to defendant's coercion defense (App. 53) and attempted to discredit the threat made by Duggan (App. 54). Not unexpectedly, counsel for the defendant emphasized the fear of Mr. Duggan in referring to coercion in his summation (App. 57-58). As requested by the defendant, the Court gave a standard coercion instruction (App. 59), immediately following the counsels' summation to the jury.

At 3:42 p.m. on May 26, 1976, the Court received a second note from the jury. This note read "We would like to have the law as to entrapment and coercion (sic) again." (App 60) Without objection from either side, the Court summoned in the jury and reread the original instructions on these two defenses

(App. 60-63). The jury then proceeded to deliberate the remainder of that day (App. 63).

The jury continued deliberating the following day and shortly thereafter submitted a note requesting certain testimony. Included in this note was a specific request signed by the foreman of the jury asking "Does the term coercion apply only to 'Government by force' or can it apply as threats or force by others than the Government?" (App 64). The Court then elicited comments from counsel, and the prosecutor suggested that the Court simply reread the same coercion instructions (App. 65). Defense counsel expressly requested a rereading of the coercion instruction and an instruction, in response to the jury's query, that coercion involves private individuals.

Unfortunately, the Court refused to respond to either suggestion of counsel and gave no oral indication as to how he would react to the renewed coercion instruction (App. 65-66). To relieve any doubts about the unanimity of these requests, the Court made further inquiry and was informed that all jurors sought the aforementioned information (App. 69).

The Court then sent the jury back to the jury room to rephrase their questions concerning the sought-after testimony, but no mention was made by the Court concerning the request for a reinstruction on the law.

At 12:45 p.m., two hours and twenty minutes after the original request for reinstruction on coercion, the jury informed the Court to disregard the previous three requests for testimony (App. 70). At 1:20 p.m. the jury returned a verdict of guilty.

ARGUMENT

It is elementary that the judge instructs the jury correctly on the law and the jury applies that law to the facts of the case. Fed. R. Crim. P. 30; Bollenback v. United States, 326 U.S. 607, 612 (1945). No matter how diligent, sagacious, and concerned a jury might be, the jury system is undermined if jurors incorrectly apply the law or lack total understanding of it.

> "Discharge of the jury responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Bollenback v. United States, supra at 612.

Although the Court in this case properly instructed the jury on the law of coercion, the subsequent jury notes manifested an extreme confusion on the very fundamental nature of the defense (App. 60, 63). There can be little doubt that one is excused from criminal conduct if one acted out of compulsion and "in apprehension of immediate and impending death or serious and immediate bodily harm," from a non-governmental individual. Iva Ikuko Toguri I'Aquino v. United States, 192 F.2d 338, 358 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935). Any confusion that might have been inherent in the original charge was further increased by the interchanging

of entrapment and coercion by the government in its summation (App. 55-56). Under these circumstances, there is little wonder that the jury requested a supplementary instruction on whether coercion involves force "'. . . by others than the Government?'" (App. 64)

There are no Second Circuit cases directly on point. However, other circuits have confronted similar problems and invariably held that the court should resolve the jury's uncertainty on the law when so requested. In United States v. Bolden, 514 F.2d 1301, 1307-1308 (D.C. Cir. 1975), the jury submitted a note to the court showing that it was confused as to whether the felony-murder rule applied to a situation where the felonious intent arose after the murder. Although defense counsel requested that the jury be given a specific and correct response, the trial judge did no more than reread the standard felony-murder rule instruction. In reversing and ordering a new trial, the court held that although the initial, unobjected instruction was sufficient, a court is obliged to respond to a jury request when confusion is shown. The court should not allow the "troubled jury to rely on a layman's interpretation of a superficially simple but actually complex statute." United States v. Bolden, supra at 1309.

In an often-cited District of Columbia Circuit Court decision, the court held that:

> "Where, as here, the need for more appears, it is the duty of the judge to fill in the sketch, as may be appropriate on the basis of the evidence, to provide the jury with light and guidance in the performance of its difficult task." Wright v. United States, 250 F.2d 4, 11 (D.C. Cir. 1957) (en banc).

In the Wright decision, the jury's note indicated a misunderstanding of the law of insanity in that circuit. Instead of clarifying the issue, the court simply did nothing since it had already correctly instructed the jury on the law. The appellate court held the denial of this instruction to be reversible error.

Although some courts have upheld the trial court's discretion in refusing to answer a jury's request, those cases are clearly distinguishable from the case at bar. They usually involve a jury request for the rereading of an instruction which has already been given and there is no indication from the note of jury confusion on the law. e.g. United States v. Rodriguez, 510 F.2d 1, 3 (5th Cir. 1975).

Nor is the present case like those cases where the instruction is actually reread after some delay. United States v. Jarboe, 374 F. Supp. 310, 317 (W.D. Mo. 1974), aff'd 513 F.2d 33 (8th Cir. 1975); United States v. Pfingst, 477 F.2d 177 (2nd Cir. 1973), cert. denied, 412 U.S. 941 (1973). Nor is the case here presented in any way similar to the situation where the court exercises its discretion in refusing a jury request for written instructions. Oertle v. United States, 370 F.2d 719 (10th Cir. 1966), cert. denied, 387 U.S. 943

(1967); United States v. Abbadessa, 470 F.2d 1333 (10th Cir. 1972).

Appellant did everything in his power to inform the court of his position. When advice on how to respond was sought by Judge Murphy, appellant "made known to the court the action which he desire[d] the court to take, ..." Fed. R. Crim. P. 51. Counsel for the appellant stated that "I would ask that the instruction be re-read with an explanation that it also concerns coercion by private individuals." (Emphasis added) (App. 66). Instead of responding to counsel's request, the court simply passed on to the other matters raised by the jury's note.

Considering the jury's earlier request for a coercion instruction and its concern about Marks' going to the police (App. 67), the jury was obviously contemplating and giving weight to the coercion defense. If properly instructed, a verdict of not guilty might very well have been rendered in a short period of time. Powell v. United States, 347 F.2d 156, 158 (9th Cir. 1965).

Although the court had already reread the coercion charge, it quite obviously was not enough and did not resolve the ambiguity. cf. United States v. Bright, 517 F.2d 584 (2nd Cir. 1975). Even an hour after the original request, the jury reaffirmed that the information sought was needed by "all the jury" and not an individual juror (App. 68-69). The

Court had an obligation to respond to this confusion, and in cases where the court has gone as far as a careful re-reading of the instruction, reversible error has been found. United States v. Wright, supra; United States v. Bolden, supra at 1308, 1309; United States v. Pfingst, supra. A fortiori, when the court fails to do anything in response to manifest jury confusion, reversal is mandated.

CONCLUSION

Because of the note requesting advice on whether coercion involved force from a private individual, the Court had a duty to assist the jury. United States v. Cheramie, 520 F.2d 525, 532 (5th Cir. 1975). As the Court knew, testimony of appellant and the defense witness Conway revealed threats of force by government agents and a private person, Richard Duggan. The Court had originally agreed to give the coercion charge immediately subsequent to testimony of threats from a private party (App. 39-40). For the jury to proceed in its deliberations on the mistaken belief that only the government coercion was a proper defense, completely denied appellant the opportunity to have the jury consider Duggan's actions. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenback v. United States, supra at 612-613. The Second Circuit has recognized that a "trial judge should, of course, generally provide prompt additional instructions upon request from a jury." United States v. Pfingst, supra at 197.

The appellant, therefore, respectfully requests that the judgment of conviction be vacated and that this case be remanded for a new trial.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the appellant's brief and appendix to the brief has been hand-carried to the Office of the United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 4th day of August, 1976.

Richard S. Cramer

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